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December 19, 2018

ADVISORY OPINION NO. 2018-18

Mr. Preston Register
Attorney, Houston County
Post Office Box 1748
360 North Oates Street
Dothan, Alabama 36302/36303

**Conflict of Interest/Use of Office for
Personal Gain**
A County Commissioner may vote on a
matter concerning his public employer,
provided that neither he nor a family
member is uniquely affected by the vote.

A public employee, who is also a public
official by virtue of being an elected County
Commissioner, may use equipment,
facilities, time, materials, human labor, or
other public property under his discretion or
control as a public employee for the benefit
of the County, or the County Commission,
without violating the Ethics Act, provided
that the use does not benefit him or a family
member personally and does not violate his
employer's separate policy, if any, regarding
such use.

Dear Mr. Register:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTIONS PRESENTED

1. Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on the county's general budget, given that funds will be allocated in the general budget to the Houston County Sheriff?
2. Can Mr. Herring vote on budgetary matters that involve the whole county?
Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on the Sheriffs budget as a portion of the overall budget?
3. Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on any individual item that relates to the Sheriff's budget or that is requested by the Sheriff?
4. If the answer to question #4 is affirmative-the commissioner can vote for such items, are there any restrictions on what items Mr. Herring would not be able to vote on specifically?
5. Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on a specific item for the Sheriff that would not relate to him as an employee of the Sheriff in any way, either directly or indirectly?
6. Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on a specific item for the Sheriff that will not benefit him directly? For example, can Mr. Herring vote on the purchase of vehicles for the Sheriff if he is not receiving one of those vehicles?
7. Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on a particular item for the Sheriff that may benefit him indirectly?
8. Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on a particular item for the Sheriff that will benefit him indirectly?
9. Can Mr. Herring, as a county commissioner who is a sergeant of the Houston County Sheriff, vote on a particular item for the Sheriff that will benefit him directly?
10. Mr. Herring may receive phone calls or be asked questions by citizens concerning his duties as a county commissioner while he is at work as a sergeant for the Sheriff-can he receive those phone calls on his Sheriff-issued phone and can he discuss issues related to his duties as a county commissioner while he is at work as a sergeant for the Sheriff?
11. If Mr. Herring is on-call as a sergeant while performing duties as a county commissioner, can Mr. Herring drive the vehicle issued by the Sheriff to a function in his role as a county commissioner since the need for Mr. Herring to be available immediately is a possibility?

12. Can Mr. Herring use paid leave as an employee of the Sheriff to take time off from his duties as an employee of the Sheriff to attend functions and perform his duties as a county commissioner?

13. Can Mr. Herring use unpaid leave as an employee of the Sheriff to take time off from his duties as an employee of the Sheriff to attend functions and perform his duties as a county commissioner? 14. If vacation time or other leave time would be paid, can Mr. Herring use such time to perform his duties as a county commissioner?

FACTS AND ANALYSIS

This request is for Mr. Ricky Herring, who is a sergeant for the Sheriff of Houston County, Alabama, and will soon be sworn in as a county commissioner for Houston County, Alabama. The separation of these two roles has caused concerns for Mr. Herring related to the Alabama Ethics law for public officials and public employees, ALA. CODE § 36-25-1 et seq.

Mr. Herring is employed on an hourly basis as a sergeant for the Sheriff of Houston County, Alabama, Sheriff Donald Valenza. Mr. Herring is an investigator for the Sheriff, works approximately 40 hours per week in that capacity, and is over approximately seven other officers and two clerical staff in his position as sergeant of the Criminal Investigations Division. Additionally, Mr. Herring is a member of the special response team, a peer support coordinator, a hostage negotiator, and a member of the homeland security team. The hours that Mr. Herring is assigned to work is determined by the Sheriff. Mr. Herring has assigned hours to work, and Mr. Herring is also on call as a supervisor or in one of his other roles in the event he is needed for a particular crime. For example, in the event of a homicide, Mr. Herring may be called out to the scene outside of his normally assigned hours.

The Sheriff receives funding from the Houston County Commission, but the Sheriff does not answer to the Commission. And, the Sheriff operates separately from the Commission. Questions 1-10 raise the issue of his ability to vote on county matters given his employment as a Sheriff's Deputy. A County Commissioner may vote on a matter concerning his public employer as long as neither he nor a family member is uniquely affected by the vote. This question was addressed by this Commission in AO 2016-33 as follows:

In the case of Lambert v. Wilcox County Commission, 623 So. 2d. 727 (Ala. 1993) the Alabama Supreme Court held, "We do not believe that the legislature intended to include county governmental agencies in the § 36-25-1(1) definition of 'business'. Therefore, Perryman's vote on the ordinance conferring a financial benefit on his employer, the Wilcox County Board of Education, does not violate the prohibition against obtaining a financial benefit for a 'business with which he is associated'." What the Court in Lambert recognized was a difference in public versus private entities for purposes of the definition of "business" in the Act.

By that same reasoning, therefore, a Council member can vote on a general allocation to the Montgomery Public Schools, a public entity which employs either the Council member or a family member of the Council member, provided that neither the Council member employed by the school system nor the family member employed by the school system receives any unique benefit by virtue of their vote.

There are likely to be items that are voted upon that will benefit the Sheriff's Department and therefore benefit Mr. Herring indirectly. Unless there is a *unique* benefit, however, his vote will not violate the Ethics Act. See also Advisory Opinion 2007-07. As always, if a conflict of interest arises, a further, detailed inquiry can be requested from the Commission at the time it arises. In all circumstances, abstention is an option if there is a possible or perceived conflict.

Regarding Questions 11-15, public employees and public officials are typically restricted from using equipment, facilities, time, materials, human labor, or other public property under their discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy per Ala. Code §36-25-5(d). However, under these circumstances, Mr. Herring is operating as a public official and a public employee, oftentimes simultaneously if he is on-call. As stated previously, the Alabama Supreme Court has held that a public entity is not a "business" as defined in Ala. Code §36-25-1(1). Therefore, any use of equipment, facilities, time, materials, human labor, or other public property under Mr. Herring's control as an employee of the Sheriff's Department for the benefit of the County Commission is primarily an issue that should be resolved by the Sheriff's Department by way of a written policy regarding such use. Mr. Herring may not use any equipment, facilities, etc. of the Sheriff's Department for either his personal benefit or that of a family member under the terms of Ala. Code §36-25-5(d).

CONCLUSION

A County Commissioner may vote on a matter concerning his public employer, provided that neither he nor a family member is uniquely affected by the vote.

A public employee, who is also a public official by virtue of being an elected County Commissioner, may use equipment, facilities, time, materials, human labor, or other public property under his discretion or control as a public employee for the benefit of the County or the County Commission without violating the Ethics Act, provided that the use does not benefit him or a family member personally and does not violate his employer's separate policy, if any, regarding such use.

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AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on December 19, 2018.



Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission